GOVERNMENT OF MALAYSIA A

v.

MARGARET AU NYAT FAH

HIGH COURT SABAH & SARAWAK, KUCHING B
HAMID SULTAN ABU BACKER JC
[SUIT NO: 22-77-2005-II]
31 OCTOBER 2007

LIMITATION: *Action - Income tax - Claim for income tax due and owing - Plea of limitation - Whether applicable - Sarawak Limitation Ordinance, s. 33* C

CIVIL PROCEDURE: *Action - Income tax - Claim for income tax due and owing - Whether facts of case warranted a stay of the judgment - Whether stay should be granted* D

The appellant/plaintiff herein was appealing against the decision of the deputy registrar who dismissed the appellant's application for summary judgment pursuant to O. 14 of the Rules of the High Court 1980 ('RHC 1980'). The appellant's claim against the E respondent/defendant was for income tax due and owing for assessment years 1968, 1969, 1970, 1972 and 1973, including ten percent and five percent increases levied under the provision of ss. 103(4) and (5A) of the Income Tax Act 1967 ('ITA 1967'). The respondent was sued as the administratrix of the estate of F the late Joseph Goh Meng Teck. The respondent's main line of defence was that the appellant's claim was statute barred pursuant to Sarawak Limitation Ordinance ('SLO'). Further, the respondent complained, *inter alia*, that (i) the estate of the deceased being aggrieved by the said plaintiff's assessment has appealed to the G Special Commissioners of Income Tax; (ii) that the plaintiff was advised that the collection of tax under reference be stood over until the disposal of the tax appeal in the High Court, leading the defendant to believe that the plaintiff would not proceed with any action against the defendant until the disposal of the tax appeal H in the High Court; (iii) the suit by the plaintiff, the tax appeal process, the travel restriction and matters relating thereto had caused the defendant much mental stress and hardship.

I

Held (allowing the appeal):

(1) The respondent's plea of limitation would not apply as s. 33 of SLO specifically said that SLO shall not apply to any proceedings by the government for the recovery of any tax, duty or interest, etc and that tax assessed as due and payable may be recovered by the government as a debt due and owing to the government, notwithstanding the mode of assessment or the quantum derived was objected by the tax payer. (para 4)

(2) The administratrix was deprived from traveling overseas when the tax due and owing was not personal to her. When there is an abuse such as this, the court must readily act to provide the remedy to the victim. In this instance, the court was obliged to grant the judgment as per the law. However, the court was not restricted from granting a stay of the judgment if the facts of the case warranted so. A stay should be granted herein for the following reasons (i) the claim of the appellant was as old as 29 years; (ii) the dispute had been referred to Special Commissioners and there was an appeal pending against the decision of Special Commissioners; (iii) the administratrix was not personally liable for the tax but had been put to hardship; (iv) the appellant by conduct have shown that they would await the decision of the Court of Appeal. (para 4)

[In respect of the stay, the respondent is at liberty to file the relevant application before the learned senior assistant registrar.]

Legislation referred to:

Income Tax Act 1967, ss. 99, 102, 103(1), (4), (5A), 106(1), (3), 142(1)
Rules of the High Court 1980, O. 14
Sarawak Limitation Ordinance, s. 33

For the appellant/plaintiff - Ashrina Ramzan Ali; Lembaga Hasil Dalam Negeri
For the respondent/defendant - Bexter Michael; M/s Ee & Lim

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the appellant/plaintiff's appeal against the decision of the learned deputy registrar who dismissed the appellant's application for summary judgment pursuant to O. 14 of the Rules of the High Court 1980 (RHC 1980).

Brief Facts

[2] The appellant's claim against the respondent is for income tax due and owing for Assessment years of 1968 (additional), 1969 (additional) 1970 (additional) 1972 (additional) and 1973 (additional), including the ten percent and five percent increases levied under the provision of ss. 103(4) and (5A) of the Income Tax Act 1967 (ITA 1967). The defendant is sued as the administratrix of the estate of the late Joseph Goh Meng Teck. The respondent's main line of defence is that the appellant's claim is statute-barred pursuant to Sarawak Limitation Ordinance (SLO). Further, the respondent complains as follows:

(i) the plaintiff had in 1991 filed a suit against the defendant under suit No KG 39 of 1991, and thereafter withdrawn the suit.

(ii) the estate of the deceased being aggrieved by the said plaintiff's assessment has appealed to the Special Commissioners of Income Tax. After the Special Commissioners handed down their decision, the deceased being dissatisfied with the decision of the Special Commissioners contained in the Deciding Order dated 11 May 1979 filed a notice of appeal against the same.

(iii) with regards to the said tax assessment, the Senior Federal Counsel in his letter to the plaintiff dated 11 June 1979 and copy to the deceased's solicitor, advised the plaintiff that the collection of tax under reference be stood over until the disposal of the tax appeal in the High Court. This letter has led the defendant to believe that the plaintiff would not proceed with any action against the defendant until the disposal of the tax appeal in the High Court. By a letter dated 14 April 1997, the defendant was informed by the plaintiff that the plaintiff has issued a certificate to the Commissioner of

A Police, Sarawak and the Director of Immigration, Sarawak that the defendant be barred from leaving Malaysia until the tax amounting to RM504,615.40 has been settled by the defendant.

B (iv) with regards to the appeal to the Special Commissioners of Income Tax and appeal in respect of the Special Commissioners decision, the estate has sought the legal advice of an established legal firm whose expertise in the field of income tax law is highly regarded. The suit by the plaintiff, the tax appeal C process, the travel restriction and matters relating thereto had caused the defendant much mental stress, hardship and expenses to the defendant.

The Law

D **[3]** Section 103(1) of the ITA 1967 states that tax payable under an assessment shall, on the service of the notice of assessment on that person assessed, be due and payable at the place specified in that notice whether that person appeals against the assessment or not. Under ss. 103(4) and (5A) of the ITA E 1967, the ten percent and five percent increases shall be recoverable as if it were tax due and payable under the same Act. Section 106(1) of the ITA, 1967 also states that tax due and payable may be recovered by civil proceeding as a debt due to the government. Furthermore, s. 106(3) of the ITA 1967 provides F inter alia that the court shall not entertain any plea if the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s. 103(4) and (5A). If the deceased was aggrieved by the said assessment raised on him, he has a right to object and appeal against the assessments under G the provisions of s. 99 of the ITA 1967 and such objection and appeal would be heard and decided by the Special Commissioners of Income Tax in due course as provided under s. 102 of the ITA 1967. A certificate under s. 142(1) of the ITA 1967 signed by the Director of Inland Revenue, Sarawak shall be sufficient evidence H of the amount so due and sufficient authority for the court to give judgment for that amount.

[4] I take the view that (i) the respondent's plea of limitation will not apply as s. 33 of SLO specifically says that SLO shall not I apply to any proceedings by the government for the recovery of any tax, duty or interest, etc. (ii) tax assessed as due and payable

may be recovered by the government as a debt due and owing to the government, notwithstanding the mode of assessment or the quantum derived is objected by the tax payer. Section 106 (3) of the ITA 1967 states: "In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s. 103 (4), (5) or (5A)." This section, to some extent in my view, is in breach of natural justice and violates the spirit of the Federal Constitution. A judgment obtained on an erroneous assessment which the defendant cannot honour may lead him to be made a bankrupt and/or to financial ruin. Among all civil laws, this appears to be the harshest and some of the measures taken to collect taxes as on the facts of this case are *prima facie* seen to be oppressive. For example, in this case, the administratrix was deprived from travelling overseas when the tax due and owing was not personal to her. When there is an abuse such as this, the court must readily act to provide the remedy to the victim. In this instance, the court is obliged to grant the judgment, as per the law. However, the court is not restricted from granting a stay of the judgment, if the facts of the case warrant so. In my view, a stay should be granted in this case *inter alia* for the following reasons: (i) the claim of the appellant is as old as 29 years. (ii) the dispute has been referred to Special Commissioners and there is an appeal pending against the decision of Special Commissioners. (iii) the administratrix who is not personally liable for the tax has been put to hardship and the appellant by conduct have shown that they will await the decision of the Court of Appeal.

[5] For reasons stated above, I allow the appeal of the appellant with costs. The getting up fees should not exceed RM10,000. If costs cannot be agreed, the appellant is at liberty to tax his costs. In respect of the stay, the respondent is at liberty to file the relevant application before the learned senior assistant registrar who shall deal with the application according to law.